Office - Supreme Court, U.S.
FILED
OCT 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-512

In the

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

PUBLIC SERVICE COMPANY OF INDIANA, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANNE M. GORSUCH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF OF THE INDIANA AIR POLLUTION CONTROL BOARD

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF OF THE INDIANA AIR POLLUTION CONTROL BOARD

Comes now the Indiana Air Pollution Control Board, by its counsel, the Attorney General of Indiana, and files this Motion for Leave to file an Amicus Curiae Brief.

INTEREST OF INDIANA AIR POLLUTION CONTROL BOARD

The Indiana Air Pollution Control Board (APCB) is an agency of the State of Indiana created by statute, Indiana Code 13-1-1-3 (1982). APCB has the duty and power, pursuant to Indiana Code 13-1-1-4(3) (1982), to adopt and promulgate reasonable rules and regulations consistent with the general intent and purpose of the Air Pollution Control Board Act. Indiana Code 13-1-1-1 et seq. (1982). Indiana Code 13-7-5-1(c) (1982) and Indiana Code 13-7-7-1 et seq. (1982) also provide APCB with the authority to adopt rules and regulations relating to air quality in the State of Indiana. Further, Indiana Code 13-7-5-1(e) provides APCB may act for the State in the adoption of standards pursuant to any federal law regarding environmental protection of air. Indiana Code 13-7-2-10(c) (1982) designates APCB as the air pollution agency for the

State for all purposes of the Federal Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. IV 1980).

Thus, in a cause wherein the rules of the State relating to air pollution control are at issue, APCB is uniquely qualified and authorized to support its rules.

GROUNDS FOR LEAVE TO FILE

The interest of the State of Indiana is represented in this brief by APCB. The State may file an Amicus Curiae Brief without consent of the parties. United States Supreme Court Rule 36.4. APCB's Amicus Curiae Brief could have been written then with a different caption and the Amicus Curia Brief would have been accepted automatically. Because of the last-minute "mandate" of APCB to the Attorney General to file an Amicus Curiae Brief herein, without time for input from the Governor, it was determined that the Amicus Curiae

Brief should be brought in the name of APCB. Yet, APCB only is authorized by the Indiana Code to act for the State of Indiana herein, Indiana Code 13-7-2-10(c) (1982), and should be allowed to intervene as the State.

APCB was informed of the issue herein after the Petitioner's Petition for Writ of Certiorari had already been filed. APCB may or may not still be able to obtain the consent of the parties. APCB filed its Brief in the reasonable belief that it could do so as the State without consent of the parties.

The issue left in the Petition for Writ of Certiorari is whether Environmental Protection Agency may partially adopt, rather than adopt in whole or reject, a State's revision to its State Implementation Plan (SIP) under the Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. IV 1980).

Since it is Indiana's SIP at issue and the rule which APCB promulgated, both of which are APCB's responsibility, APCB has a real interest herein. The outcome of this cause must directly affect APCB and the State's entire air pollution control program. APCB's opinion and interpretation of the law is highly relevant and should be considered.

WHEREFORE, APCB prays that the United States Supreme Court grant its Motion for Leave to File an Amicus Curiae Brief.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OF THE INDIANA AIR POLLUTION CONTROL BOARD AS AMICUS CURIAE

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QUESTION PRESENTED FOR REVIEW

When the United States Environmental Protection Agency disapproves an integral portion of a regulation submitted by the State as a revision to its State Implementation Plan under the Clean Air Act, is the remaining portion of the regulation enforceable by the Agency if it is neither:

(1) Adopted by the State as a state regulation; nor

(2) Promulgated as a federal regulation pursuant to the provisions of the Act?

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OF THE INDIANA AIR POLLUTION CONTROL BOARD AS AMICUS CURIAE

THE INTEREST OF THE STATE OF INDIANA

The State, due to industries under the jurisdiction of the Indiana Air Pollution Control Board ("APCB"), are adversely affected by the decision of the Court of Appeals. The holding of this decision seriously undermines APCB's reponsibility and authority to revise its State

Implementation Plan ("SIP") under the Clean Air Act, 42 U.S.C. §§7401-7626 (Supp. IV 1980) (the "Act"). The decision allows the United States Environmental Protection Agency ("EPA"), without any notice, opportunity for comment, or public hearing, to delete integral portions of revisions to Indiana's SIP and immediately to enforce those revisions *as amended by EPA*, without giving APCB its opportunity to submit another regulation to EPA for review as required by Section 110(c)(1) of the Act. 42 U.S.C. §7410(c)(1) (Supp. IV 1980). The judicial affirmation of this far-reaching EPA authority to substitute its judgment for that of APCB impairs Indiana's statutorily-guaranteed freedom and responsibility to revise its SIP and to determine the appropriate mix of emission limitations applicable to critical Indiana industries. The APCB has a clear interest in seeking reversal of the Court of Appeal's decision.

SUMMARY OF THE STATE'S ARGUMENT

The decision below fundamentally alters the balance of powers between state and federal authority created by the Act. This Court has twice determined that the States, not EPA, have the primary authority under the Act to determine the appropriate "mix of emission limitations [they] deem[ ] best suited to [their] particular situations." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975); see also *Union Electric Co. v. EPA*, 427 U.S. 246, 250 (1976); 42 U.S.C. §7401(a)(3) (Supp. IV 1980). EPA may override the State's choices only in narrowly defined circumstances, and only by following mandatory procedures prescribed in the Act. 42 U.S.C. §§7410(c)(1), 7607(d) (Supp. IV 1980).

Nevertheless, the Court of Appeals' decision allows EPA to substitute its judgment for that of the State by simply drawing a line through an integral portion of the State's duly promulgated SIP revision, thereby substantially

changing the scope and meaning of that regulation. EPA may then immediately enforce the balance of the regulation as amended by EPA, without any notice, opportunity for comment, or public hearings. However, the Act does not permit EPA to create its own regulation in such a fashion. Because the decision below (1) usurps the States' primary role under the Act to develop and revise their SIPs; (2) expands EPA's authority far beyond that conferred by Congress; (3) directly affects the ongoing revisions of over fifty State Implementation Plans; and (4) effectively eliminates numerous procedural requirements from the Act, the Petition for Certiorari presents a question of national significance which should be decided by this Court.

ARGUMENT

I. The APCB Has Never Agreed With EPA's Claimed Authority To Revise And Has Consistently And Unsuccessfully Sought EPA Approval Of The Disputed Regulation As Well As Subsequent Revisions Thereto.

In 1968, the APCB promulgated a regulation called APC-3, which limited the "smoke" emitted from any "combustion installation" to 40% opacity. *1969 Editions and Revisions to Rules and Regulations (Indiana) 11.* APC-3 became a federally enforceable part of Indiana's "applicable implementation plan" when it was approved by EPA on May 31, 1972. 42 U.S.C. §§7410(d), 7413 (Supp. IV 1980); 37 Fed. Reg. 10,863-65 (1972). (This version of APC-3 is hereafter called "1972 APC-3").

In 1974, APCB amended APC-3 and submitted this SIP revision to EPA for approval or disapproval on November 8, 1974. ("1974 APC-3"). This revision was not prompted by an EPA finding under 42 U.S.C. §7410(a)(2)(H) (Supp. IV 1980), that 1972 APC-3 was inadequate, but was born out of APCB's desire to improve its air pollution control regulations. 1974 APC-3 was a complete revision of 1972

APC-3. On the one hand, coverage was expanded from "combustion installations" to "any equipment." On the other hand, the Board restricted the coverage of 1972 APC-3 by providing a 15-minute per day exemption from its 40% opacity restrictions. 325 IND. ADMIN. CODE 1-3 (1979). Thus, although the class of sources subject to APC-3 was enlarged, those sources would not violate the new regulation unless emissions occurred "for more than a cumulative total of 15 minutes in a 24-hour period." *Id.*

APCB considered the 15-minute exemption a critical and necessary part of its revised regulation. Many sources brought within the coverage of 1974 APC-3 could not, for economic and technological reasons, comply with the 40% opacity limit unless some exemption was provided. Consequently, 1974 APC-3 without the exemption would be invalid under Indiana law. IND. CODE §13-7-7-2 (1976, Cum. Supp. 1981). Not only was the exemption essential to 1974 APC-3's validity, but APCB reasoned that the additional adverse air quality impacts arising from the exemption would be *de minimus* and more than offset by the expansion of coverage to other sources.

As interpreted below, EPA's October 21, 1975 decision regarding 1974 APC-3 had the effect of approving 1974 APC-3's expansion of coverage while at the same time disapproving the exemption, and rendered the modified regulation, which was much more stringent than any opacity regulation ever promulgated by the State, immediately enforceable by EPA, and only by EPA. EPA never published any notice of intent to disapprove any portion of 1974 APC-3; the public, including APCB, was never given an opportunity to comment upon this amended regulation; and EPA's version of APC-3 ("EPA APC-3") was never subject to a public hearing, all in violation of the Act.

APCB has never accepted that EPA's October 21, 1975 action, standing alone, was sufficient to change a duly

promulgated State regulation or to create a federally enforceable regulation. The State has tried to eliminate this problem by twice seeking EPA's approval of new revisions of APC-3. On June 26, 1979, Indiana submitted a revised version of APC-3 to EPA for approval as a SIP revision. 325 IND. ADMIN. CODE 1-3.1 (1980 Supp.). On March 27, 1980, EPA published notice of its intent to disapprove that revision. 45 Fed. Reg. 20,432, 36-38 (1980). On October 6, 1980, Indiana submitted another revision to APC-3. 325 IND. ADMIN. CODE 5 (1982 Cum. Supp.). Although EPA has not taken final action on that submission, it published notice of its intent to disapprove on March 3, 1982. 47 Fed. Reg. 9020-21 (1982). As a result, EPA's version of APC-3, not APCB's version, has been enforced against Indiana sources of air emissions for nearly seven years in violation of the fundamental tenet of the Clean Air Act that the states are to develop the appropriate mix of emission limitations.

II. EPA Does Not Have The Authority To Approve Portions And Disapprove Portions Of Revisions To State Implementation Plans.

Although the Act grants EPA authority to make partial approvals of a state's original SIP, it does *not* permit EPA to make partial approvals of a state's revision to its original SIP. *Compare* 42 U.S.C. §7410(a)(2) (Supp. IV 1980) ("the Administrator shall... approve or disapprove such plan, or each portion thereof") with 42 U.S.C. §7410(a)(3) (Supp. IV 1980) ("the Administrator shall approve any revision of an implementation plan...."). The rationale for this different language is simple. Once the original plan is in place and is not found to be inadequate by EPA, disapproval of an entire SIP revision leaves the existing adequate SIP in force. This is not the case with the original plan. Rather than require wholesale rejection of the original plan thereby leaving nothing in effect, EPA was allowed to disapprove portions and to fill the gaps created by this selective disapproval with a federal

regulation if — *and only if* — the state thereafter failed to fill the gaps itself. 42 U.S.C. §7410(c)(1)(B) (Supp. IV 1980).

The provisions of Section 110(c)(1), 42 U.S.C. §7410(c)(1) (Supp. IV 1980), complement this statutory scheme. Section 110(c) authorizes and requires EPA to promulgate a federal SIP regulation in lieu of a state regulation in certain narrowly defined circumstances. Section 110(c)(1)(B) requires EPA to promulgate a federal replacement regulation if: (1) it disapproves the original SIP or any portion thereof; and (2) the state fails to submit an acceptable alternative. If a portion of the original SIP is disapproved, there is no existing SIP to fall back on, and EPA must promulgate a replacement regulation to fill that gap. There is no comparable provision permitting EPA to promulgate a federal regulation when it disapproves a portion of a voluntarily submitted SIP revision. This is because when EPA disapproves a SIP revision in full, there is an existing approved SIP to fall back on. No federal regulation is required because there is no gap to fill.

When EPA acted on 1974 APC-3, 1972 APC-3 was still a valid part of Indiana's applicable implementation plan. As stated by Petitioner at page 12 of its Petition, denying EPA its claimed authority to approve portions of a SIP revision not only is consistent with the statutory language, but also leaves the State with the primary authority to choose the appropriate mix of emission limitations. See *Train*, 421 U.S. at 79, 86-87; *Union Electric*, 427 U.S. at 269. APCB's options were to continue with 1972 APC-3, to adopt and submit EPA's version of 1974 APC-3, or to develop and submit an entirely new alternative. The decision below does not leave the primary responsibility for revising the appropriate mix of limitations with the State, but rather allows EPA to substitute its judgment for that of the State by simply drawing a line through portions of a State SIP revision it does not like, thereby substantially changing the meaning and scope of the State's regulation. And, as shown in section III below, that decision allows EPA to

accomplish this result in complete disregard for the procedures written into the Act by Congress.

III. The Statute Provides EPA With The Exclusive Avenue To Substitute Its Judgment For That Of The State.

There are only two ways a regulation becomes part of a state's "applicable implementation plan." The regulation may either be a state regulation approved by EPA under Section 110(a)(2), or a federal regulation promulgated by EPA under Section 110(c). 42 U.S.C. §7410(d) (Supp. IV 1980). Since it is clear that EPA APC-3 is not a State regulation, the only way it may be an enforceable part of Indiana's SIP is if it is a federal regulation.

Section 110(c)(1) provides the only mechanism Congress prescribed for EPA to develop and enforce federal regulations. There are only three circumstances in which EPA may promulgate a federal SIP regulation: first, if the state fails to submit an original SIP meeting the requirements of the Act, 42 U.S.C. §7410(c)(1)(A) (Supp. IV 1980); second, if EPA disapproves a state's original plan or any portion thereof, 42 U.S.C. §7410(c)(1)(B) (Supp. IV 1980); or third, if the state fails to revise its SIP after being notified by EPA that the state plan is inadequate. 42 U.S.C. §7410(c)(1)(C) (Supp. IV 1980).[1] The decision below allows a fourth, non-statutory circumstance in which EPA can delete portions of a voluntary state SIP revision and to create a federal replacement regulation without following the mandatory procedural requirements of the Act. *See* 42 U.S.C. §§7410(c)(1), 7607(d) (Supp. IV 1980).

If EPA felt that both 1972 APC-3 and 1974 APC-3 were inadequate, and that some other regulation was needed, it

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[1]It is clear that Section 110(c)(1) does not authorize or require EPA to develop a federal regulation when it disapproves a portion of state's SIP revision because the statute does not permit a partial disapproval of SIP revisions.

was required to disapprove 1974 APC-3 in its entirety and to notify Indiana that 1972 APC-3 was not sufficient to meet ambient air standards. 42 U.S.C. §7410(a)(2)(H) (Supp. IV 1980). If Indiana failed to promulgate a satisfactory replacement within 60 days of this notice, or such longer period as EPA might allow, EPA had a mandatory duty to promptly publish a proposed federal replacement regulation. If the State did not submit a satisfactory substitute within six months of the date established in the notice for Indiana to submit its new regulation, then, and *only* then, was EPA authorized to substitute its judgment for the State with its own regulation. The decision below rewrites this section of the Act by granting EPA another, non-statutory procedure for substituting its judgment for the State.

The decision also effectively eviscerates numerous statutory procedures enacted as part of the 1977 amendments to the Act which must be followed by EPA in developing a federal regulation when such a regulation is permitted. To develop such a regulation, EPA must:

(1) Establish a rulemaking docket available to the public in Washington, D.C. and in the appropriate regional EPA offices, 42 U.S.C. §7607(d)(2), (d)(4)(A) (Supp. IV 1980);

(2) Promptly publish notice of proposed rulemaking in the Federal Register, 42 U.S.C. §7410(c)(1), 7607(d)(3) (Supp. IV 1980);

(3) Establish a period for receiving public comments on the proposed regulation, 42 U.S.C. §7607(d)(3) (Supp. IV 1980);

(4) Hold a public hearing in the affected State on EPA's proposed regulation, 42 U.S.C. §7410(c)(1) (Supp. IV 1980);

(5) File all comments and the transcript of any public hearings in the docket, 42 U.S.C. §7607(d)(4)(B)(i) (Supp. IV 1980);

(6) Respond to all comments received, 42 U.S.C. §7607(d)(6)(B) (Supp. IV 1980); and finally

(7) Promulgate, and justify through reasoned decisionmaking, a final rule for the State.

The decision below allows EPA to ignore all these requirements.[2] The court reasoned that Section 110(c) rulemaking would be "unnecessarily duplicitous." Courts and agencies do not have the authority to ignore the express procedures required by Congress. Moreover, the "significance of rulemaking cannot be underemphasized. It gives parties affected by a decision an opportunity to participate in the decision-making process and forces EPA to articulate the bases for its decisions." *Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295, 1305 (W.D.N.Y. 1979). Unless the court of appeals decision is reversed by this Court, rather than follow the congressionally imposed rulemaking requirements, EPA may fundamentally change a State's regulation by simply drawing a line through a portion of that regulation thereby substituting its judgment for that of the State; oust the State of its primary role under the Act; eliminate the State's second chance to devise a regulation of its own choosing; and immediately enforce EPA's regulation without any due process whatsoever. Such a result was clearly not contemplated by Congress, and cannot be justified in light of the Act's requirements.

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[2]Only after following these mandatory procedures, may EPA substitute its judgment for the state. As pointed out at pages 18-19 of the Petition, Congress recognized that holding a public hearing in the affected state and considering, analyzing, and responding to public comments from the state, affected industries, and the general public, might result in changes to EPA's proposed regulation. These requirements are also consistent with a general theme of the Act, that no State Implementation Plan regulation, be it state or federal, can become an enforceable part of a SIP unless subjected to public notice, comment, and public hearings. 42 U.S.C. §§7410(a)(2), 7410(a)(3), 7410(c)(1) (Supp. IV 1980).

CONCLUSION

The Air Pollution Control Board of the State of Indiana, appearing by its Attorney General as *amicus curiae*, respectfully tenders this Brief in Support of Public Service Company of Indiana, Inc.'s Petition For Writ of Certiorari filed September 23, 1982. The State supports the positions presented by Petitioner, and urges this Court (1) to grant certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit herein, and (2) to reverse the Appellate Court's decision for the reasons set forth above.

Dated: October 22, 1982.

Respectfully submitted,

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